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No. 429.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

THE STATE OF TENNESSEE ET AL., APPELLEES.

MEMORANDUM REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION.

J. CARTER FORT,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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v.
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MEMORANDUM REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION.

It is asserted in appellees' brief that the findings of discrimination by the Interstate Commerce Commission were confined to findings that the lower intrastate rates resulted in undue preference to persons and localities within the State of Tennessee and undue prejudice to persons and localities outside of the State. This assertion is relied upon as support for much of the argument advanced. But it seems very plain that the Commission based its order not only upon findings of preference and prejudice in respect to certain persons and localities but also upon the finding that the lower level of rates within the State resulted in an "unjust discrimination against interstate * * * commerce" as that term is used in section 13 (4).

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The Commission expressly found that the failure of the carriers to increase their intrastate rates "for the transportation of stone and gravel when used for the construction of public highways and consigned to Federal, State, county, or municipal authorities" in amounts corresponding with increases which were made in the interstate rates on the same commodities, upon the authority of Ex parte 74,

> has resulted in the past and will result in the future in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining States and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining States; in undue preference to persons and localities in Tennessee; *and in unjust discrimination against interstate commerce.* (Italics ours.) (Record, pp. 38, 39.)

The Commission thus made an explicit finding of general discrimination against interstate commerce. Appellees attempt to explain away the force of this finding by saying,

> The additional words * * * "in unjust discrimination against interstate commerce" are restricted by the preceding reference to persons and localities and are not additional findings of fact. These words are merely descriptive of the effect of the unjust prejudice to persons and localities in interstate commerce in States adjoining Tennessee, as found by the Commission.

But the findings of the Commission are in the words of section 13 (4), and unless it can be said that the words "undue, unreasonable, and unjust discrimination against interstate or foreign commerce" as used in the statute are merely descriptive of the "undue or unreasonable advantage, preference, or prejudice as between persons and localities" referred to in the preceding language of the statute and add nothing to that language, it can not be said that these words in the Commission's findings add nothing to the preceding findings.

In *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, it was contended that the phrase "undue, unreasonable, or unjust discrimination against interstate or foreign commerce" was tautological and added nothing to the preceding language of the statute. The contention was rejected by the Court and conclusively answered in the following language:

> Counsel for appellants * * * are forced to the position that the words [undue, unreasonable, or unjust discrimination against interstate or foreign commerce] are tautological and a mere repetition of "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand," which precede them. In view of their apt application to the most important purpose of the legislation, we are not at liberty to take such a view. If "undue, unreasonable,

or unjust discrimination against interstate or foreign commerce" are tautological, why are they followed by the phrase "which is hereby forbidden and declared to be unlawful"? To accompany a meaningless phrase with words of such special emphasis would be unusual.

It is urged that in previous decisions, notably the *Minnesota Rate cases*, 230 U. S. 352, the *Shreveport case*, *supra*, and the *Illinois Central case*, *supra*, the expression "unjust discrimination against interstate commerce" was often used when, as the law then was, it could only mean discrimination as between persons and localities, and therefore that it is to be given the same limited meaning here. But here the general words are used after discrimination against persons and localities have been specifically mentioned. The natural inference is that even if they include what has gone before they mean something more. When we find that they aptly include a kind of discrimination against interstate commerce which the operation of the new act for the first time makes important and which would seriously obstruct its chief purpose, we can not ignore their necessary effect.

In addition to the language quoted above from the findings of the Commission, the report contains other language which shows unmistakably that the Commission intended to make a general finding of discrimination against interstate commerce as well as findings of prejudice and preference in respect to

localities and persons. For example, the Commission stated:

> From figures based on actual movements of stone and gravel during the year ended September 30, 1920, respondents estimate that the refusal of the Tennessee commission to permit the increases in rates on those commodities when used for road building is costing the Louisville & Nashville, the Nashville, Chattanooga & St. Louis, and the Southern Railways, in the aggregate, about $16,445 annually.
>
> The record conclusively shows that with few exceptions the proposed rates on stone and gravel would not exceed respondents' interstate rates on these commodities between points in Tennessee and points in adjacent States for similar distances. The latter rates are shown by numerous comparisons to be relatively just and reasonable. In authorizing an increase in the rates on stone and gravel for commercial purposes the Tennessee commission impliedly approved the general level of those rates as increased. The lower rates on municipal shipments unjustly discriminate against and unduly prejudice interstate commerce. (Record, p. 38.)

Referring to this expression by the Commission, pellees say, "this purports only to state an estimate the carrier. It is not the finding of the Interstate mmerce Commission. No reference to this esti-te is made 'in the Commission's findings.'" parently, appellees assume that the Commission st make formal findings of the primary or minor

facts upon which its conclusions are based. But this is not necessary except in cases where damages are awarded. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 490. The Commission had before it evidence concerning the general discrimination against interstate commerce caused by the disparity between the interstate rates and intrastate rates, and the Commission considered such evidence.

Appellees base their case exclusively upon section 22, claiming that intrastate transportation for the State of Tennessee and other governmental authorities is exempted from the jurisdiction of the Interstate Commerce Commission by this section, the pertinent language of which is repeated here for convenience:

> That nothing in this act shall prevent the carriage, * * * of property free or at reduced rates for the United States, State, or municipal governments, * * *.

It will be observed that the exemption claimed is not specifically provided for by the language quoted. The purpose of the act to regulate commerce, prior to the amendments contained in the Transportation Act, 1920, was to prevent carriers from charging extortionate rates and from discriminating between shippers. In section 22 Congress simply made a distinction between transportation for the United States, State, and municipal governments on the one hand and transportation for private parties on the other, and rendered it possible for carriers to discriminate in their rates and charges between the two

classes of traffic. This was not inconsistent with the purpose of the law.

But the scope and purpose of the act to regulate commerce were greatly enlarged by the amendments. "The most important purpose" of the amendments was to maintain an adequate transportation system, and to that end it was provided that the Commission should fix rates which would yield to the carriers a fair return on the value of their properties. It was also provided as an integral and necessary part of the new scheme of regulation that unjust discrimination against interstate commerce should be unlawful. This was deemed necessary to make certain that intrastate commerce would contribute its fair share of the requisite revenue of the carriers.

The discrimination presented in this case is not discrimination between Government shipments and private shipments such as is contemplated by section 22, but discrimination between State and interstate commerce of identically the same character, and the result of such discrimination is that the State commerce involved does not carry its just part of the cost of maintaining the transportation system, contrary to the manifest purpose of Congress.

Furthermore, the discrimination is not the result of the exercise by the carriers of any privilege which they claim under section 22, but the result of action taken by the State of Tennessee. The evident purpose of section 13 (3) (4) was to prevent State authorities from burdening interstate commerce.

Section 22 does not confer upon the carriers the right to discriminate against interstate commerce and in favor of intrastate commerce of the same character, and certainly it does not confer upon the States power to compel such a discrimination.

The power of the Interstate Commerce Commission to prescribe rates applicable to the transportation of Government property is as great as its power to prescribe rates applicable to the transportation of private property, and the rates so prescribed are as binding in the one case as in the other until the carrier exercises such rights as it may have under section 22 which are discussed hereinabove.

Notwithstanding the right of carriers to discriminate between what may be called public traffic on the one hand and private traffic on the other, conferred by section 22, the Commission has never considered it necessary to provide for this distinction in its orders, and it is apparent that to do so would be a work of supererogation. The right of carriers to discriminate between public and private traffic results not from orders made by the Commission but from the law itself, and the Commission's orders will be interpreted by the court with that fact in mind.

The order of the Commission under consideration here does not require carriers to exact rates for the transportation of traffic for the State of Tennessee in intrastate commerce which are greater than the rates contemporaneously exacted by them for the transportation of like traffic in interstate commerce.

contrary, the order leaves the carriers entirely
reduce rates applicable to the former trans-
on if they make corresponding reductions in
es contemporaneously applied by them to the
rtation of like traffic in interstate commerce.

J. CARTER FORT,
For Interstate Commerce Commission.

FARRELL,
Of Counsel.
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